

DISTRICT OF MAINE

Docket No. 03-182-B-W

(a) *Basis for suspension.* An individual is ineligible for SSI benefits for any month during which he or she is —

(1) Fleeing to avoid prosecution for a crime, or an attempt to commit a crime, which is a felony under the laws of the place from which the individual flees

(b) *Suspension effective date.* (1) Suspension of benefit payments because an individual is a fugitive as described in paragraph (a)(1) . . . of this section . . . is effective with the first day of whichever of the following months is earlier —

(i) The month in which a warrant or order for the individual's arrest or apprehension . . . is issued by a court or other duly authorized tribunal on the basis of an appropriate finding that the individual —

(A) Is fleeing, or has fled, to avoid prosecution as described in paragraph (a)(1) of this section . . . ; or

(ii) The first month during which the individual fled to avoid such prosecution . . . if indicated in such warrant or order

(c) *Resumption of payments.* If benefits are otherwise payable, they will be resumed effective with the first month throughout which the individual is determined to be no longer fleeing to avoid such prosecution

20 C.F.R. § 416.1339.

The plaintiff received SSI benefits as a result of an application filed in December 1999. Record at 13. In January 2002 the commissioner suspended payment of the benefits on the ground that the plaintiff was fleeing to avoid prosecution for a felony. *Id.* A hearing on the suspension was held before an administrative law judge on March 10, 2003. *Id.* The administrative law judge made the following relevant factual findings in a decision dated May 21, 2003:

In July, 2001 the claimant visited Ft. Lauderdale, Florida. While there, he was briefly detained by the Broward County, Florida police, after allegedly having purchased crack cocaine from [an] undercover police officer. He was released almost immediately and was not issued a summons. He was told by the law enforcement officials not to “show [his] face” in the area again. While no arrest was made initially, the county prosecutor decided to press charges the following day, in consequence of which an arrest warrant was issued on July 11, 2001 by the Broward County, Florida sheriff's office.

the administrative record.

The claimant left Florida unaware of the warrant. He was never given a summons or other papers relating to the matter. He was not notified of any criminal complaint or court proceedings. He briefly returned to Florida later that year, still unaware of the warrant. He was never arrested. The claimant knew nothing of the warrant until January, 2002, at which time the Social Security Administration notified him of its intent to terminate his Supplemental Security Income payments.

Law enforcement officials in Florida are unwilling to attempt to extradite the claimant, but they continue to insist that he turn himself in to satisfy the warrant. The undersigned is satisfied by this record that although the claimant is now aware of the warrant, and although he would like to settle the warrant, and although he has been informed by law enforcement officials in Florida that he must turn himself in there to satisfy the warrant, he is unable to travel to Florida for two reasons. First, he can ambulate only with assistive devices, is wheelchair bound at times, and is prevented by his medical condition from traveling. Second, he has been released on bail in Maine, pending disposition of a separate charge, and a condition of his bail is that he remain in the State of Maine.

Id. at 17. The administrative law judge found that the plaintiff did not flee and was not fleeing the state of Florida to avoid prosecution for a felony under these circumstances and that he consequently was not ineligible for SSI payments. *Id.* at 18-19.

The Appeals Council reviewed this decision on its own motion. *Id.* at 6. Noting that the plaintiff had satisfied the felony warrant on May 22, 2003, the day following the administrative law judge's decision, *id.*, the Appeals Council held that the claimant was a fleeing felon under the statute and regulation from July 2001 through May 31, 2003, *id.* at 9. The Appeals Council did not "disturb" the commissioner's decision to waive recovery of benefits paid from July 2001 through March 2002. *Id.* at 8. Accordingly, at issue in the present appeal are the benefits for the period from April 2002 through May 2003. Statement of Specific Errors (Docket No. 13) at 3 n.3.

The Appeals Council held that, as a matter of law, the only issue to be decided was "whether nonpayment was appropriate based on the information obtained from a law enforcement entity," and that

the mere existence of a valid warrant is sufficient to establish that nonpayment was appropriate. Record at 8. The Appeals Council rejected the plaintiff's argument that he was entitled to refute the presumption that he was fleeing prosecution despite the existence of the warrant. *Id.*

At oral argument, counsel for the plaintiff conceded that his argument that the plaintiff could not have been "fleeing" prosecution during the period when he was unaware of the existence of the warrant has been rendered moot by the commissioner's decision to pay him benefits for that period. The following discussion accordingly deals only with the period after the plaintiff became aware of the existence of the Florida warrant.

The Social Security Administration's Program Operations Manual ("POMS") states flatly that "[a]s long as a United States warrant or court order is active, SSA considers an individual to be 'fleeing' for SSI eligibility determination purposes. This is true even if the law enforcement agency is unwilling to extradite." POMS § SI 00530.030, 2003 WL 22245598. The First Circuit has required the commissioner to comply with POMS. *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19, 23-24 (1st Cir. 1986). The plaintiff relies on a decision of the Ninth Circuit to support his argument that POMS has "absolutely no effect or persuasive force," Statement of Specific Errors at 9, but the law in this circuit is otherwise. This does not resolve the matter, however, because the plaintiff contends that this interpretation of the plain language of the statute and the regulation is wrong. He suggests that an element of intent is inherent in the commonly accepted definition of the word "fleeing," which is not defined in the statute or regulation, and that the POMS provision impermissibly reads this element out of the statutory language. In the alternative, he contends that the commissioner's position creates an irrebuttable presumption in violation of the Constitution. *Id.* at 6-11.

It is true, as the plaintiff points out, *id.* at 10-11, that conviction of the crime of flight to avoid prosecution requires evidence of intent. 18 U.S.C. § 1073; *Lupino v. United States*, 268 F.2d 799, 801 (8th Cir. 1959). However, conviction under that criminal statute involves the potential deprivation of the defendant's constitutionally-protected liberty. Here, application of the "fleeing felon" statute and regulation at most deprives a claimant of benefits to which he is not constitutionally entitled. *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174 (1980); *Ciccone v. Secretary of Dep't of Health & Human Servs.*, 861 F.2d 14, 17 (2d Cir. 1988). That is a significant distinction, making the courts' interpretations of the criminal statute of little or no value for the issue before this court. Of more value here is the First Circuit's statement, in the course of construing 18 U.S.C. § 3290, which provides in its entirety that "[n]o statute of limitations shall extend to any person fleeing from justice," that "[t]he essential characteristic of fleeing from justice is leaving one's residence, or usual place of abode or resort, or concealing one's self, with the intent to avoid punishment." *Brouse v. United States*, 68 F.2d 294, 295 (1st Cir. 1933). The First Circuit found an element of intent inherent in that statute, which did not criminalize the flight itself.

In *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court established guidelines for review of a governmental agency's construction of a statute which it administers.

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43. If “the legislative delegation to an agency [to elucidate a specific provision of the statute] . . . is implicit rather than explicit,” “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Id.* at 844. In this case, the meaning of the term “fleeing” is not unambiguously expressed in 42 U.S.C. § 1382(e)(4), the delegation of regulatory authority to the commissioner is implicit, and this court must therefore determine whether the commissioner’s interpretation as set forth in POMS is reasonable.

As the plaintiff notes, Statement of Specific Errors at 6, Black’s Law Dictionary defines the term “flee from justice” to include an element of intent.² It is also significant that section 1382(e)(4) uses the words “fleeing to avoid prosecution” rather than “fleeing while subject to prosecution” or some similar language. “Fleeing to avoid” something necessarily implies an intent to avoid that thing. I agree with the plaintiff that the commissioner’s interpretation of the statute as set forth in POMS is unreasonable to the extent that it presumes that the statute applies merely from the existence of an arrest warrant. I find support for this conclusion in the First Circuit’s statement in *Brouse*. In addition, while the Appeals Council was careful in this case not to include language in its decision that could be construed to hold that it interprets the statute as requiring a finding of intent, the decision in *Blakely v. Commissioner of Soc. Sec.*, 2004 WL 574532 (W.D. Mich. Mar. 8, 2004), is consistent with my conclusion. I reach the issue which the district court did not reach in that case, but the outcome is the same.

My conclusion that intent is an element of the statutory standard applicable in this case means both that a claimant must have an opportunity to establish his lack of intent, as was provided in this case, and that

² The only other definition offered by the plaintiff, from the American Heritage Dictionary, Second College Edition, Statement of Specific Errors at 6, cannot reasonably be construed necessarily to include an element of intent.

remand to the commissioner to consider the evidence of intent is necessary. It also means that consideration of the plaintiff's alternate, constitutional argument is not required.

At oral argument, counsel for the commissioner contended that the recent refusal of Congress to adopt a proposed revision to 42 U.S.C. § 1382(e) that would have required the commissioner to obtain certification from the appropriate law enforcement authority that it intended to pursue the individual for whom a warrant exists before that person could be considered to be "fleeing," *see Social Security Administration Legislative Bulletin* 108-11 (Nov. 14, 2003) at 4 and *Social Security Administration Legislative Bulletin* 108-18 (Mar. 4, 2004) at 4-5, means that the existing statutory language cannot reasonably be construed to include an element of intent. I disagree. The existing statutory language may still reasonably be interpreted to include an element of intent; whether the issuing law enforcement agency intends to enforce an existing warrant is an entirely different question. Counsel for the commissioner also argued that allowing a recipient of benefits to attempt to prove that he had no intent to flee prosecution would mean that the statute had "no point," but the individual still has the burden to prove that assertion. If he cannot do so to the commissioner's satisfaction, the statute requires that his benefits be terminated. Since counsel for the commissioner conceded that any recipient for whom a warrant is issued is entitled to a hearing at which he may attempt to show that the warrant is not valid or active or that he was a victim of mistaken identity, there is little additional burden imposed on the commissioner if the recipient is also allowed to try to show that he had no intent to flee. Contrary to the suggestion of counsel for the commissioner, not all of the other evidentiary judgments that must be made by an administrative law judge are totally objective in nature, unlike an evaluation of a recipient's intent. Courts generally defer to an administrative law judge's analysis of a claimant's credibility, for example. If, as counsel for the commissioner contended, the commissioner has established "objective standards" for the evaluation of

credibility, no reason why she cannot do so as well for evaluation of the intent of a recipient subject to a warrant is readily apparent.

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the cause **REMANDED** for further proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 24th day of June, 2004.

/s/ David M. Cohen

David M. Cohen

United States Magistrate Judge

Plaintiff

ADAM J THOMAS

represented by **JUDSON ESTY-KENDALL**
PINE TREE LEGAL ASSISTANCE,
INC.
ROOM 41
61 MAIN ST.
BANGOR, ME 4401
207-942-8241
Email: jesty-kendall@ptla.org

V.

Defendant

**SOCIAL SECURITY
ADMINISTRATION
COMMISSIONER**

represented by **ESKUNDER BOYD**
SOCIAL SECURITY
ADMINISTRATION
OFFICE OF GENERAL COUNSEL,
REGION I
625 J.F.K. FEDERAL BUILDING
BOSTON, MA 02203
617/565-4277
Email: eskunder.boyd@ssa.gov